

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
DOCKET NO. \_\_\_\_\_

[3:97cr333]

**LEROY J. KELLY,**

Petitioner,

Vs.

**UNITED STATES OF AMERICA,**

Respondent.

SCREENING  
ORDER

**THIS MATTER** is before the court on petitioner's "Petition Requesting the District Court to Hold a Kastigar Hearing." See United States v. Kelly, 3:97cr333 (#88). While petitioner states that such motion is not barred as a second or successive petition under the AEDPA because he seeks a hearing under Kastigar, review of such motion reveals that a post-judgment motion under Kastigar v. United States, 406 U.S. 441 (1972) is, in fact, a motion under 28 U.S.C. § 2255 as it attacks the validity of the underlying conviction. See United States v. Griffin, 451 Fed.Appx. 706 (9<sup>th</sup> Cir. Oct. 5, 2011). Indeed, attempts to seek a Kastigar hearing as a way around the bar of the AEDPA has been recently addressed by other courts and found to be wanting:

The court realizes that Morales contends that his previous 2255 motion differs from the Kastigar argument he wants to make now because earlier he "only addresse[d] ... the potential Kastigar violations[.]" whereas now he is seeking "a true Kastigar hearing." This is a distinction without a difference.

United States v. Morales, 2010 WL 5376319 (D.Ariz. Dec. 27, 2010) (citation omitted). While such district decision is not binding, it is highly persuasive.

The court, therefore, deems the "Petition Requesting the District Court to Hold a Kastigar Hearing" to be a petition under Section 2255. It appearing that petitioner has already filed and

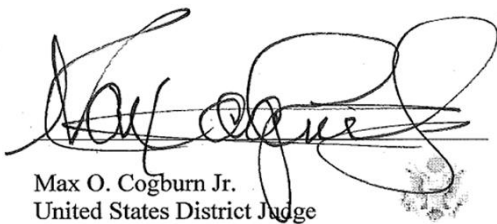
fully exhausted his Section 2255 remedy, see Kelly v. United States, 3:13-cv-00276-MOC and that the Court of Appeals for the Fourth Circuit has not authorized the filing of this second or successive petitioner as required by 28 U.S.C. §§ 2244(b)(3) and 2255, the court will dismiss this petition.

**ORDER**

**IT IS, THEREFORE, ORDERED** that:

- (1) the Clerk of Court open a new civil action as petitioner has attempted to file a second or successive petition under 28 U.S.C. § 2255; and
- (2) petitioner's "Petition Requesting the District Court to Hold a Kastigar Hearing" is deemed to be a second or successive petition under Section 2255 and is **DISMISSED** as required by 28 U.S.C. §§ 2244(b)(3).

Signed: June 12, 2013

  
Max O. Cogburn Jr.  
United States District Judge